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No. .....

In The

Supreme Court of the United States

October Term, 1982

CHARLES TERRY,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FOURTH DISTRICT

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QUESTION PRESENTED

Whether the application of the harmless error doctrine was improper, where both the Illinois trial and appellate courts found that the prosecutor impermissibly commented on the defendant's failure to testify?

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STATE OF ILLINOIS,

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PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS FOURTH DISTRICT

Petitioner, Charles Terry, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the Appellate Court of the State of Illinois, Fourth District, entered in this proceeding on August 26, 1982.

OPINION BELOW

The opinion of the Appellate Court of the State of Illinois, Fourth District, is unreported. A copy of the court's opinion is included in the appendix as Exhibit A.

———o———

JURISDICTION

The petitioner was convicted of murder in Champaign County Circuit Court and sentenced to 35 years imprisonment. His timely filed post-trial motion asserted that rights guaranteed him by the Fifth and Fourteenth Amendments to the Constitution of the United States were violated by the prosecutor's rebuttal closing argument commenting on petitioner's failure to testify. This motion was denied.

A timely appeal was prosecuted to the Appellate Court of the State of Illinois, Fourth District, where the petitioner asserted that his constitutional right to remain silent under the Fifth and Fourteenth Amendments to the Constitution of the United States was violated by the improper comments of the prosecutor. The appellate court held the prosecutor's remark on the petitioner's failure to testify was error, but deemed it to be harmless, and affirmed the conviction.

Petitioner sought leave to appeal from the Illinois Supreme Court in a timely fashion. On November 30, 1982, the Illinois Supreme Court denied his petition for leave to appeal. A copy of the order denying leave to appeal is included in the appendix as Exhibit B.

Jurisdiction of the United States Supreme Court to review the decision of the Illinois Appellate Court, Fourth District, by petition for writ of certiorari is conferred by 28 U. S. C. § 1257 (3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Relevant portions of the Fifth and Fourteenth Amendments to the Constitution of the United States, and Illinois Revised Statutes, Chapter 38, § 155-1, are set forth in the appendix as Exhibit C.

STATEMENT OF THE CASE

Charles Terry, a black man, was charged with the murder of Edward Swims, also a black man, which occurred on June 14, 1981, in Douglas Park, Champaign, Champaign County, Illinois.

In a closely contested case, the jury convicted Charles Terry of murder after deliberating in excess of 17 hours, in addition to overnight sequestration. Extensive impeachment of prosecution and defense witnesses by prior convictions of crimes and prior inconsistent statements occurred during the eight-day trial in which 44 witnesses testified, 19 for the state and 25 for the defendant. Charles Terry chose not to testify after the trial court overruled

a motion *in limine* seeking to prevent his impeachment by prior convictions for armed robbery.

The state contended, through witnesses Ricky Dean King, Othell Williams, and James Carter, that Charles Terry and the victim Swims were riding with them in a black van on the Sunday afternoon of the murder. These witnesses described encountering Swims at a liquor store in Champaign, then picking up Charles Terry at his mother's residence a few blocks away, and proceeding on to Charles Terry's residence.

King, a principal witness for the prosecution, testified that he had given Charles Terry his .22 caliber, 9 shot, pearl-handled revolver a few days earlier, and had gone to Charles Terry's residence that afternoon to retrieve the gun. Later that same afternoon he gave the gun back to Charles Terry while they were in the van, just prior to their arrival at Douglas Park. King, Terry and Swims got out of the van at the park, and sat down at a picnic table near the softball diamond, with Carter and Williams departing in the van. King related an argument arose between Swims and Terry about Terry's uncle Bob, whereupon Terry pulled out the gun and shot Swims three or four times. King and Terry then fled the scene.

Altha Marie Terry bolstered the state's case with her testimony that Charles Terry came to her residence late that Sunday afternoon and gave her a gun, shirt, and a scarf. She described a conversation in which Charles Terry told her he "took someone out of the game", and then asked her to burn the scarf and shirt and put the gun away for safekeeping. After brandishing the gun later that evening during an argument with her cousin, by-

standers took the gun away from Altha Marie Terry. Ultimately, the gun was given to the Champaign police as a result of the skirmish that had ensued that evening. Ballistics tests later established that the gun was the murder weapon.

In establishing his alibi defense, Charles Terry brought forth multiple witnesses from the environs of the park to show that he was not present before, during, or after the time of the shooting when the assailants fled. Witnesses Johnny Wilson, Lela Wilson, and E. V. Davis testified Charles Terry was not the individual present with King and Swims at the picnic table just prior to the shooting. Other witnesses established that Terry was picked up at his mother's residence *after* the shooting and not before.

Defense witnesses Marquita Sykes and Curtis Jones established that the killer had braids. Other witnesses identified Ricky Dean King as having braids and wearing a bandana on the day of the murder, implicating Ricky Dean King as the person who shot and killed Edward Swims.

Heavy emphasis was placed on the fact that King was on parole and curried favor with the authorities by naming Charles Terry as the assailant. The defense asserted a conspiracy among the prosecution witnesses, with great reliance on the impeachment of those witnesses by their prior conviction, their prior inconsistent statement (especially in the case of Altha Marie Terry in her testimony before the grand jury), and their motive, bias, and interest in testifying against Charles Terry.

The cumulative effect of the defense evidence tended to establish that Ricky Dean King had, in fact, committed the murder, and the time frame when Charles Terry joined King, Williams, and Carter in the van that day made it impossible for him to have been present when the shooting occurred.

Both prosecution and defense delved into the contradictions in the evidence, impeachment by witnesses' prior convictions, and impeachment by witnesses' prior inconsistent statements during the lengthy closing arguments. One after the other, prosecutor and defense lawyer emphatically declared that the credibility of witnesses was crucial. The prosecutor advised the jury it could arrive at either a guilty or not guilty verdict, depending on who the jury believed. If the jury believed Ricky Dean King and Altha Marie Terry, it must convict. On the contrary, if the jury did not believe Ricky Dean King and Altha Marie Terry, it must acquit. Defense counsel argued not only that the evidence did not prove that Charles Terry committed the murder, but also that the evidence established Ricky Dean King was the culprit.

The prosecutor concluded his rebuttal portion of closing argument by saying:

> You heard about the events of that afternoon, five people in the van and three of them came in here and told you what happened and one is dead, thank you Ladies and Gentlemen.
>
> R. 763

The jury was instructed, *inter alia,* that it should not consider the fact that the defendant did not testify in arriving at its verdict (I.P.I. 2.04).

Although no objection was made at the time of the prosecutor's remark, the defendant's post-trial motion raised as error the improper comment of the prosecutor that referred to the defendant's failure to testify at trial. The trial court held the prosecutor's remarks were not permissible, but held them to be harmless error beyond a reasonable doubt. The defendant was sentenced to 35 years imprisonment.

Defendant's conviction was appealed to the Appellate Court for the Fourth Judicial District, where the court affirmed the lower court judgment. Although commenting on the continued persistence by prosecutors to use such tactics, and holding the remark of the Assistant State's Attorney to be error, the court deemed it to be harmless.

Petitioner sought review by the Illinois Supreme Court, filing a petition for leave to appeal, asserting the prosecutor's closing remark was a substantive constitutional violation of petitioner's right constituting reversible error. On November 30, 1982, the petition for leave to appeal was denied by the Illinois Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

The harmless error rule should not be applied in cases where the constitutional error is premised upon a defendant's right to remain silent.

This case presents the significant issue now before the Court in *U. S. v. Hastings,* 660 F. 2d 301 (7th Cir.,

1981), cert. granted, — U. S. —, 102 S. Ct. 2232 (No. 81-1463, 5/17/82), argued 50 L. W. 3915 (12/7/82), concerning application of the harmless error rule to a prosecutor's impermissible comment on a defendant's failure to testify. In *Hastings,* the prosecutor argued as follows:

> The defendants at no time ever challenged any of the rapes, whether or not that occurred, and any of the sodomies. They didn't challenge the kidnapping, the fact that the girls were in East St. Louis and they were taken across to St. Louis. They never challenged the transportation of the victims from East St. Louis, Illinois to St. Louis, Missouri, and they never challenged the location or whereabouts of the defendant at all the relevant times. They want you to focus your attention on all of the events that were before all of the crucial events of that evening. They want to pull your focus away from the beginning of the incident in East St. Louis after they were bumped, and then the proceeding events. They want you to focus to the events prior to that.
>
> *U. S. v. Hastings,* 660 F. 2d at 303, note.

The Seventh Circuit Court of Appeals reasoned that only the defendants and the three victims were present when the crimes occurred and, thus, the argument was a direct reference on the defendants' failure to testify. Notwithstanding clear evidence of guilt, the Court of Appeals reversed, pointing to "clear constitutional violation of the defendants' Fifth Amendment rights."

There is a dichotomy among jurisdictions about the application of harmless error analysis where Fifth and Fourteenth Amendment rights are affected. Some jurisdictions identify whether a prosecutor's closing remarks can be said to directly point to the defendant's failure to testify, and if error is found, a conviction is reversed only

if that error is harmless beyond a reasonable doubt, following this Court's holdings in *Griffin v. California*, 380 U. S. 609 (1965), and *Chapman v. California*, 386 U. S. 18 (1967). See, *e. g., Eberhardt v. Bordenkircher*, 605 F. 2d 275 (6th Cir., 1979); *U. S. v. Sanders*, 547 F. 2d 1037 (8th Cir., 1976), cert. denied, 431 U. S. 956 (1976); and *State of Iowa v. Nelson*, 234 N. W. 2d 368 (Ia., 1975). The other category of jurisdictions follow the *Hastings* rule, which identifies a fundamental violation of constitutional right, and reverses for that reason alone. *David v. State*, 369 So. 2d 943 (Fla., 1979); *Qualls v. State*, 371 So. 2d 949 (Ala. Cr. App., 1979).

The difficulty that the prior holdings of this Court present is this type of prosecutorial misconduct seeks to capitalize upon a defendant's failure to testify, to turn the silence as an attack upon the defendant's credibility as a defendant for somehow being untruthful and therefore guilty because he did not come forward. The Fourth District Appellate Court in the present case noted this phenomenon when it stated:

> It appears to us to be quite remarkable, and equally incomprehensible, why prosecutors risk reversal by persisting in a course of conduct which has long been condemned as error. It becomes even more mysterious why they feel compelled to comment on an obvious fact. That the defendant did not testify is just as open and patent as the fact that he is on trial. Any juror sitting through the trial is as equally aware of the situation as the court or counsel, or anyone else in the courtroom. Nonetheless, the matter appears and reappears in the reviewing courts with pious regularity.

A clear line of Illinois cases established the precedent necessary to advise the prosecutor in this case that his argument was improper. See, *People v. Wollenberg*, 37 Ill. 2d 480, 229 N. E. 2d 490 (1967); *People v. Burton*, 44 Ill. 2d 53, 254 N. E. 2d 527 (1969); and *People v. Evans*, 78 Ill. App. 3d 996, 398 N. E. 2d 326 (1979). Also see, Illinois Revised Statutes, Ch. 38, § 155-1. Notwithstanding this guidance, the Assistant State's Attorney tactically placed his improper argument so that the last comment the jury received would emphasize the fact that the defendant did not testify. It also forced the defendant into a compromising position, where an objection would only highlight the rebuttal statement.

In instances when the comment on the defendant's silence is deliberate, courts should have no difficulty in protecting the fundamental constitutional right of such defendant. This Court should grant certiorari in this case as a companion to *U. S. v. Hastings*, to not only vindicate Charles Terry, but to protect other defendants from overzealous prosecutors who trample upon the Fifth Amendment right to remain silent.

II.

Because of the closely contested nature of the defendant's case, the prosecutor's improper argument was not harmless error beyond a reasonable doubt.

Even if one were to assume that the harmless error rule should apply in cases where clear violations of fundamental constitutional rights have occurred, in a case where the evidence of guilt is not clear, constitutional error occurs when the conviction is allowed to stand. The question presented under *Chapman v. California*, 386 U. S. 18 (1967), requires focus upon the prosecution's case to determine whether it was such that "honest, fair-minded

jurors might very well have brought in not-guilty verdicts."

While some may disagree whether harmless error is present, the better reasoned interpretation of the rule presumes error flows from the constitutional violation, and fixes the burden upon the state to demonstrate the contrary. Indeed, one court has noted that one statement emphasizing the defendant's failure to testify may be enough to require reversal. In *Eberhardt v. Bordenkircher*, 605 F. 2d 275 (6th Cir., 1979), the court stated:

> It only takes a single comment, however, to remind a jury that the defendant has not testified and to fix in the jurors' minds the impermissible inference that the defendant is guilty merely because of his exercise of that right . . . Furthermore, the evidence in this case was far from "overwhelming." It was a strong case, perhaps; certainly enough to permit a jury to find Eberhardt guilty, but it is unlikely that we would ever hold that a case based entirely on eyewitness testimony, in the context of a brief robbery in which none of the parties knew each other, and a repudiated prior inconsistent statement, was "overwhelming." . . . Furthermore, the State's case was not undisputed. Both the other participants in the crime denied that Eberhardt was their partner, and he presented an alibi which, though far from indisputable, was inconsistent and credible enough that it might have been accepted by a reasonable juror, absent the prosecutor's improper remarks.
>
> *Eberhardt v. Bordenkircher*, 605 F. 2d at 279.

The appellate court, in reviewing the petitioner's case, noted that the prosecutor's improper argument was not invited by the defendant's summation, nor did it relate to any claim that the state's case was uncontradicted. Indeed, the appellate court noted "[t]he body of evidence for both sides was riddled with inconsistencies and contradictions." The viability of the state's case was sub-

stantially disputed on the basis of the credibility of witnesses King, Williams, Carter, and Altha Marie Terry. It was also drastically contradicted by strong alibi testimony from the defendant's witnesses and the state's own witness, Johnny Wilson.

A proper application of the harmless error rule would presume that the defendant was prejudiced by the improper argument, and shift the burden to the prosecutor to show otherwise. The proper functioning of the harmless error rule is of significance, not only to Charles Terry, but to all similarly situated defendants whose closely contested cases result in convictions under circumstances where the prosecutor improperly commented on the defendant's failure to testify. Certiorari should be granted to review the application of the harmless error rule in defendant's case.

CONCLUSION

This murder case presents a fundamental constitutional issue of recurring national significance and importance. Prosecutorial misconduct focusing upon a defendant's silence leads to distrust and mistrust within the criminal justice system. This Fifth Amendment issue warrants this Court's attention and a grant of certiorari to resolve an important question.

Respectfully submitted,

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January, 1983

APPENDIX

Exhibit A

No. 17696

IN THE APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,

Plaintiff-Appellee,

vs.

CHARLES TERRY,

Defendant-Appellant.

Appeal from Circuit Court Champaign County
No. 81-CF-693

Honorable Harold L. Jensen, Judge Presiding
(Filed August 26, 1982)

Mr. JUSTICE WEBBER delivered the order of the court:

Defendant was indicted for the offense of murder in violation of section 9-1(a)(1) of the Criminal Code of 1961. (Ill. Rev. Stat. 1979, ch. 38, par. 9-1(a)(1).) He was tried to a jury in the circuit court of Champaign County which found him guilty and the trial court sentenced him to 35 years' imprisonment.

On appeal he raises four issues for our consideration: (1) improper comment by the prosecutor on his failure to testify; (2) error by the trial court in refusing the accomplice instruction; (3) error by the trial court in ruling certain evidence to be inadmissible and restricting cross-examination of certain witnesses; and (4) reasonable doubt.

The trial consumed seven court days and forty-four witnesses testified, 19 for the State and 25 for the defendant. No good purpose would be accomplished by an extended summary of this large body of evidence. We will indicate some main points and furnish further details as may be necessary to a proper understanding of the issues.

It was the State's theory that defendant shot and killed Edward Swims in a public park in Champaign. Its principal witness was Ricky King, who owned the weapon and gave it to the defendant and who also was present at the shooting. While it was not required of the State to establish motive, some of King's testimony indicated that the shooting grew out of an argument between defendant and Swims over someone named "Bob at Nicci's" who supposedly was defendant's uncle.

Defendant's theory appeared early in the case when defense counsel represented to the court that he intended to establish through cross-examination that Swims was a narcotics user, that the killing was drug-related, and that defendant was the victim of a cover-up involving a far-reaching drug conspiracy. The trial court rejected the conspiracy theory as being too speculative, so the bulk of defendant's evidence was aimed at establishing

that it was chronologically impossible for defendant to have been at the park at the time of the shooting and that King was the real culprit.

The first issue, improper argument by the prosecutor, arose as follows: the State's evidence tended to establish that defendant, the decedent Swims, and three other persons were in a black van-type vehicle at the park immediately prior to the shooting. The last statement in the prosecutor's rebuttal argument was:

> "You heard about the events of that afternoon, five people in the van and three of them came in here and told you what happened and one is dead, thank you Ladies and Gentlemen."

Defendant did not testify at the trial and did not object to this statement at the time. However, he did preserve the matter in his post-trial motion. He argues that this was a direct comment on the fact that he did not testify and hence was an infringement on his fifth amendment rights, citing *Griffin v. State of California* (1965), 380 U. S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229, and a number of Illinois cases so holding.

It appears to us to be quite remarkable, and equally incomprehensible, why prosecutors risk reversal by persisting in a course of conduct which has long been condemned as error. It becomes even more mysterious why they feel compelled to comment on an obvious fact. That the defendant did not testify is just as open and patent as the fact that he is on trial. Any juror sitting through the trial is as equally aware of the situation as the court or counsel, or anyone else in the courtroom. Nonetheless, the matter appears and reappears in the reviewing courts with pious regularity.

The consequence is that a variety of exceptions have been developed to the rule. Two often-used ones are (1) that the argument was invited by something said in defendant's summation, and (2) that the prosecutor's comment was only on the uncontradicted nature of the State's case. Neither is applicable here. Nothing said in defendant's summation can be construed as concerning defendant's silence, nor was the State's case uncontradicted. The body of evidence for both sides was riddled with inconsistencies and contradictions.

However, under the circumstances present here, we find that the error was harmless. In his ruling on the post-trial motion the trial court stated that while the remark was error, it came at the end of three hours of argument and he himself attached no significance to it at the time. If it made no impression on the learned trial judge, it is difficult to see how a jury of laymen could be carried away by it. Moreover, the instructions to the jury were read immediately to them and they included at defendant's request the standard instruction on defendant's failure to testify (Illinois Pattern Jury Instructions, Criminal No. 2.04 (2d ed. 1981)) (IPI Criminal). The Supreme Court has indicated that this instruction possesses a large ameliorating influence. See *People v. Bey* (1972), 51 Ill. 2d 262, 281 N. E. 2d 638; *People v. Dixon* (June 18, 1982, Docket No. 55310), Ill. 2d , N. E. 2d .

While we hold the error here to be harmless, we once again indicate our discomfort with the prosecutor's tactics. History teaches that oft-repeated governmental misconduct eventually leads to drastic remedies, as witness the origin of the exclusionary rule.

Defendant next contends that the trial court erred in refusing his tendered instruction (IPI Criminal No. 3.17) on the testimony of an accomplice. His theory was that King was his accomplice and therefore the jury should be instructed to be cautious about King's testimony. We do not agree that King's share in the matter rose to that status.

An accomplice is defined in section 5-2(c) of the Criminal Code of 1961. (Ill. Rev. Stat. 1979, ch. 38, par. 5-2(c).) Two things are required to bring a person within the scope of that section: (1) he must have the intent to promote or facilitate the commission of the offense, and (2) he must do some act in furtherance of the planning or commission of the offense. The common test is to determine whether the purported accomplice himself could have been indicted for the offense. (*People v. Robinson* (1974), 59 Ill. 2d 184, 319 N. E. 2d 772.) Mere presence at the scene of the offense is not sufficient (*People v. Church* (1981), 102 Ill. App. 3d 155, 429 N. E. 2d 577), but it may be considered together with the other circumstances surrounding the event (*People v. Jones* (1973), 12 Ill. App. 3d 643, 299 N. E. 2d 77). The evidence here shows that King was present at the shooting of Swims and that he furnished defendant with the weapon used, but there is no showing that he intended to facilitate the offense nor that he participated in any planning thereof.

The present case is therefore factually unlike either *Jones* or *Church*. In *Jones* the facts bore a strong inference of common design and in *Church* the defendant performed additional acts in furtherance of the offense, even though he may not have known beforehand that it was going to occur. The evidence here was that King met

Swims at a liquor store but the meeting was casual and unplanned. The group adjourned to defendant's home to retrieve the weapon which King had given to defendant previously. This was done and King got his handgun back. Why it was later handed over to defendant is not rationally explained in the record. No common design appears.

King did not testify that he was involved in the murder; rather, he testified that he was present, heard the argument about "Bob," and fled following the shooting. *Church* also involved presence and flight, but there were also additional factors of participation which are lacking here.

IPI Criminal No. 3.17 may be given where a witness for the State testifies that he was involved in the commission of the offense. We agree with the trial court that the evidence here was insufficient. King did not testify that he was involved with the defendant in the commission of the offense and the inferences from his testimony, *i. e.*, presence at the scene and furnishing of the weapon, cannot fit the plain language of the instruction. We also agree that the alteration in language between the first and second editions of the instruction does not change its fundamental requirements.

Defendant next argues that the trial court erred in making certain evidentiary rulings which he urges related to his theory that Swims was killed by Ricky Dean King, who then orchestrated an elaborate coverup through the testimony of various witnesses, all of whom were involved in a far-reaching narcotics conspiracy. The evidence which defendant sought unsuccessfully to have ad-

mitted included testimony by the pathologist regarding needle marks on Swims's arms and irritation of the trachea; King's testimony that Swims had purchased two $50 bags of heroin and that he told King that heroin was in him; Detective Cook's testimony that he observed needle marks on Swims's arms; that he had a large sum of money on his person the preceding day; and telephone records for a telephone installed at the residence of Altha Marie Terry in the name of Eddy Owens.

In an offer of proof, Dr. Stanley Bobowski, the pathologist who conducted the autopsy, stated that he observed scars on the wrists, forearms and hands which could have been consistent with hypodermic needle injections. However, he noted the scars were not distinctive and were at least three months old, possibly older. He also noted that the marks could have been caused by something other than hypodermic needle injections. The doctor also testified that the irritation in the trachea could have been consistent with inhalation of talc, which is used to cut heroin, but also could have been consistent with some other irritant. Finally, the doctor testified that tests disclosed that there was no presence of drugs in the body although he did concede that if Swims had inhaled heroin within an hour of his death, the presence of drugs could not have been detected.

A second offer of proof was made in which defense counsel represented that King had previously reported that Swims purchased two $50 bags of heroin on the day of the shooting and that he had taken this prior to his death.

The third offer of proof revealed that Detective Cook would testify that brown envelopes retrieved from Swims's

pants pocket were not submitted for laboratory analysis to determine the presence of narcotics and that he saw small well-healed scars on Swims's arms. Cook also would have testified he heard King make the report described in the second offer of proof.

Laura Davis, Swims's girlfriend, did testify that Swims had over $200 in his possession on the day before his shooting. King testified that Swims bought a marijuana cigarette on the afternoon of the shooting.

The trial court rejected all the offers of proof, finding that they lacked relevance and carried the prejudicial inference that the victim was a person not fit to live because of narcotics. We agree with that finding.

It is elementary that a defendant is allowed wide latitude in presenting evidence which might create a reasonable doubt as to his guilt. However, the scope is not so broad as to include irrelevant or immaterial evidence. (*People v. Currie* (1980), 84 Ill. App. 3d 1056, 405 N. E. 2d 1142.) The trial court is vested with a wide discretion in the matter and its decision will not be disturbed on appeal in the absence of abuse of that discretion. (*Currie.*) If the circumstances sought to be presented are too remote, or if the evidence is too speculative, the trial court should reject the evidence. *People v. Dukett* (1974), 56 Ill. 2d 432, 308 N. E. 2d 590.

We agree with the trial court that the evidence here was both remote and speculative. The pathologist's testimony showed that his findings were consistent with causes other than drug use. King's testimony did not go to the question of the homicide itself, but only to possible motives. Motive is immaterial and irrelevant. It is also

to be noted that nowhere in King's testimony is there any suggestion of conspiracy. The same is true of the telephone calls. All that could be established was that the telephone continued to be used after Owens had moved out of Altha Marie Terry's home. There was nothing to connect it with drug trafficking except speculation.

Defendant's final contention is that of reasonable doubt. He relies on the testimony of Johnny Wilson, who defendant claims stated that defendant was not in the park on the day of the murder. A review of his testimony demonstrates that it falls short of such a contention. Wilson stated that he saw two men, but did not see the face of one, and did not see the man in the van at all. Defendant also relies on the testimony of Sykes and Jones, both friends of the defendant and both witnesses for him. Jones could not be sure whether it was a man or a woman who fired the gun.

It would be useless and almost endless to recount all the contradictions and inconsistencies in the testimony of both the State's and the defendant's witnesses. They were multifarious. Also, many witnesses were impeached. In such circumstances it is the province of the jury to judge credibility and to reconcile differences, if possible, and if not, to reject what the jury considers improbable, impossible, or unreasonable. It is not the privilege of a reviewing court to substitute its judgment for that of a jury unless there is clear prejudice on the jury's part or unless a reasonable doubt exists as to defendant's guilt. *People v. Moretti* (1955), 6 Ill. 2d 494, 129 N. E. 2d 709.

In the instant case the jury elected to believe the testimony of Ricky King and the testimony of Altha Marie

Terry when she said defendant admitted his guilt to her. It must also have believed the testimony of the three men in the van. We find no basis for disturbing its verdict.

The judgment of the circuit court of Champaign County is affirmed.

Affirmed.

LONDRIGAN and TRAPP, JJ., concur.

Exhibit B

ILLINOIS SUPREME COURT
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November 30, 1982

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No. 57363—People State of Illinois, respondent, vs. Charles S. Terry, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today *DENIED* the petition for leave to appeal in the above entitled cause.

Very truly yours,

/s/ Juleann Hornyak

Clerk of the Supreme Court

Exhibit C

ILLINOIS REVISED STATUTES
Ch. 38, § 155-1

No person shall be disqualified as a witness in any criminal case or proceeding by reason of his or her interest in the event of the same, as a party or otherwise, or by reason of his or her having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting the credibility of the witness: Provided, however, that a defendant in any criminal case or proceeding shall only at his or her own request be deemed a competent witness, and the person's neglect to testify shall not create any presumption against the person, nor shall the court permit any reference or comment to be made to or upon such neglect.

FIFTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

FOURTEENTH AMENDMENT
CONSTITUTION OF THE UNITED STATES

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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No. 82-1275

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CHARLES TERRY,

Petitioner,

vs.

STATE OF ILLINOIS,

Respondent.

On Petition For Writ Of Certiorari To The Appellate Court Of Illinois, Fourth District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the harmless error doctrine is applicable to error based upon a prosecutor's single, indirect and unobjected to reference to defendant's failure to testify where there is no reasonable possibility that it contributed to the conviction.

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RESPONDENT'S BRIEF IN OPPOSITION

OPINION BELOW

The Appellate Court of Illinois, Fourth District, affirmed petitioner's conviction for murder in an unpublished order, No. 17696, dated August 26, 1982. That order is set out in the petition for a writ of certiorari, Appendix, Exhibit A. A petition for leave to appeal to the Illinois Supreme Court was denied on November 30, 1982.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). As treated more fully below, however, the respondent submits that no good reason exists for this Court to exercise its sound judicial discretion and grant the petition for a writ of certiorari.

STATEMENT OF FACTS

Petitioner's summary of the evidence presented is adequate to apprise this Court of the extent of that evidence, however, petitioner incorrectly implies that all the witnesses offered to show that he was not present before, during or after the time of the shooting were consistent and uncontradicted.

The persons who were in the van that afternoon unanimously opposed that view. (R. 121-125, 153-155, 195-199) Carter and Williams stated that petitioner was with King in the park when they left. (R. 125, 156)

Johnny Wilson testified that he walked by the bench in the park between 3:00 and 3:30 p.m. with the victim, but he did not see petitioner. He stated positively that one of the men at the table was not petitioner, and that the second man looked bigger than petitioner. (R. 71-77) Wilson admitted that he did not see the second man's face (R. Vol. II, 79), however, and he apparently saw only two of the three men who would have been at the bench (See R. 121-124, 154).

E.V. Davis testified that he walked through the park between 3:30 and 4:00 p.m. when he saw Ricky King, the victim, and the other person he did not know on the bench by the tree. (R. 524, 526-527) Lola Wilson, Johnny Wilson's wife, testified that she walked outside her house near the park at 3:05 p.m. She stated that she did not see petitioner in or around the park, however, she also testified that the victim was sitting alone at the bench in the park at that time. (R. 512, 515, 518) Also, E.V. Davis and Lola Wilson each admitted having known petitioner for more than 15 years. (R. 512; Vol. V, 527)

Marquita Sykes and Curtis Jones both testified that they witnessed the shooting from points outside the park. In contradiction of all the other evidence in the case, Sykes and Curtis both reported that a woman shot the victim. (R. 477, 497) It was stipulated that Sykes and Curtis observed the shooting from distances of 260 feet and 300 feet, respectively. (R. C147-C148) Further, eleven-year-old Marquita Sykes testified that she had known petitioner for more than a year (R. 481, 486), and Curtis Jones stated that petitioner was a long-time friend. (R. 503)

REASON FOR DENYING THE WRIT

I.

THE HARMLESS ERROR DOCTRINE IS APPLICABLE TO ERROR BASED UPON A PROSECUTOR'S SINGLE, INDIRECT AND UNOBJECTED TO REFERENCE TO DEFENDANT'S FAILURE TO TESTIFY WHERE THERE IS NO REASONABLE POSSIBILITY THAT IT CONTRIBUTED TO THE CONVICTION.

Petitioner asserts that the harmless error doctrine should not be applied where the error is based upon a prosecutor's reference to a defendant's failure to testify. In *Chapman v. California*, 386 U.S. 18 (1967), this Court declined to accept the rule that all federal constitutional errors, regardless of the facts and circumstances, must always be deemed harmful. Rather, this Court adopted the analysis of *Fahy v. Connecticut*, 375 U.S. 85, 86-87 (1963), where it was stated that "The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction."

In the instant case the Illinois trial and appellate courts found the prosecutor's single comment to be harmless. The prosecution theory was that defendant shot and killed one Edward Swims in a public park in Champaign, Illinois. The prosecution submitted evidence tending to establish that the petitioner, the victim and three other men arrived together at the park in a black van. In concluding his rebuttal argument the prosecutor said:

> You have heard about the events of that afternoon, five people in the van and three of them came in here and told you what happened and one is dead, thank you Ladies and Gentlemen. R. 763.

The petitioner did not object to the statement. The jury was then given its instructions for deliberation which in-

cluded the instruction that the fact that the petitioner did not testify should not be considered by them in any way in arriving at their verdict. (R. 171) In ruling on petitioner's post-trial motion, the trial court stated, "It may well be that the defense counsel didn't object because if the defense counsel was like the court at that point, after three hours of argument, defense counsel may have missed the significance of that just like the court did." (R. 834)

The trial court then pointed out that the jury was properly instructed not to consider the fact that the defendant did not testify. The court went on to state that with respect to the impact upon the jury, it could "conclude from the difficult task with which they found themselves confronted, and the serious and diligent manner in which they approached it, that they evaluated the evidence in the case, they obeyed the instructions, and were not effected by the remarks of counsel." (R. 835) The trial court observed again that the remark was "practically unnoticeable" and determined, therefore, that in light of the circumstances and the evidence presented at trial the error was harmless beyond a reasonable doubt. (R. 839)

The appellate court also found the error to be harmless under the circumstances commenting that if the remark "made no impression on the learned trial judge, it is difficult to see how a jury of laymen could be carried away by it" and observing that the subsequent instruction had "a large ameliorating influence." (Pet. Appendix at 4) Although there were contradictions and inconsistencies in the testimony of both prosecution and defense witnesses, the implication of the challenged remark was vague and could not reasonably have affected the jurors' resolution of the credibility questions.

Petitioner contends, nonetheless, that the improper remark was not harmless beyond a reasonable doubt due to the closely contested nature of the case. While the issue of credibility of the witnesses was paramount, it is well established that credibility is a question for the jury, and their verdict will be sustained if there is substantial evidence to support it. *Glasser v. United States*, 315 U.S. 60, 80 (1942). Petitioner raised and lost the issue of reasonable doubt on appeal in the Illinois Appellate Court. Further, both the trial and appellate courts found little, if any, likelihood that the single, unobjected to remark could have affected the jurors' deliberations, if indeed they were cognizant of the remark and its vague implication.

This is not a case involving extensive comment on a defendant's failure to testify or where an inference of guilt from silence was stressed to the jury as a basis of conviction. *Anderson v. Nelson*, 390 U.S. 523 (1968); *Griffin v. California*, 380 U.S. 609 (1965). Nor is this a case involving substantial errors at trial which affected the overall fairness of petitioner's trial. *Eberhardt v. Bordenkircher*, 605 F.2d 275 (6th Cir. 1979). Both the trial and appellate courts below were aware of the contested nature of the evidence and both found the improper remark to be harmless. Under the particular facts and circumstances of the instant case, the error was harmless beyond a reasonable doubt and, accordingly, the petition should be denied.

CONCLUSION

For all the foregoing reasons, respondent respectfully requests that the petition for a writ of certiorari be denied.

Respectfully submitted,

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April 1, 1983